No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THE TUXEDO UNION FREE SCHOOL DISTRICT, et al.,

Petitioners,

—v.—

BRIAN CULLEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the enforcement of an otherwise valid state statute that prohibits electioneering within 100 feet of a polling place violate the free speech clause of the First Amendment in the absence of distance markers defining the boundaries of the no electioneering zone even if the person against whom the statute is enforced: (a) admittedly received actual notice of the prohibition on electioneering, and (b) knowingly and deliberately violated it after receiving such notice?

2. Does the "bad faith" exception to the Abstention Doctrine enunciated in *Younger v. Harris,* 401 U.S. 37 (1971), permit a federal district court to enjoin a pending state administrative proceeding, initiated to determine the validity of disciplinary charges against a public employee, based on nothing more than: (a) the existence of two previous disciplinary proceedings against the employee both of which resulted in the imposition of disciplinary penalties by a state administrative panel, and (b) the "chilling effect" on the conduct that is the subject of the disciplinary charges?

LIST OF PARTIES

The petitioners are The Tuxedo Union Free School District (the "District"), a public school district located in the County of Orange, State of New York; Herbert Fliegner, Superintendent of the District; Keld Alstrup, now President of the Board of Education of the District (the "Board"); and Bernard Modder, Constance Jones Phelps, Robert Quinn, Joseph Ribando and Michael Santoianni, members of the Board. Neither the District nor the Board has any parent company or subsidiary.

Respondent Brian Cullen is a tenured high school teacher employed by the District.

The parties to the proceeding before the U.S. Court of Appeals for the Second Circuit were the same.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the U.S. Court of Appeals for the Second Circuit entered on February 28, 1994.

OPINIONS BELOW

The opinion and judgment of the U.S. Court of Appeals for the Second Circuit, reported at 18 F.3d 96, are reprinted as Appendix A hereto. They affirm a judgment of the U.S. District Court for the Southern District of New York, which is not reported; the judgment of the district court, the stipulated statement of facts so ordered by the district court and the transcript of its findings of fact and conclusions of law are reprinted as Appendix B hereto.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Second Circuit was entered on February 28, 1994. This petition is filed within ninety (90) days of that date. The jurisdiction of this Court to review the judgment on petition for certiorari rests upon 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case involves an unseemly intervention by a federal district court to enjoin a pending state administrative proceeding initiated to determine whether disciplinary charges by a school district against a tenured teacher for insubordination are valid and, if so, what penalty should be imposed. The intervention was approved by a panel majority of the U.S. Court of Appeals for the Second Circuit—over a dissent by Judge Amalya L. Kearse—based on a novel First Amendment theory that not only conflicts with the applicable decisions of this Court but also calls into question the constitutionality of election laws in dozens of states.

Equally important, the decision below is a dramatic departure from the principles of federalism and comity articulated by this Court in *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny. If allowed to stand, it will engender widespread doubt and

uncertainty regarding the scope and force of the Abstention Doctrine—especially as it applies to state disciplinary proceedings.

The State Statutory Context

1. The State Tenure Statute: The New York legislature has enacted a comprehensive system that provides substantial job security for tenured teachers. N.Y. Educ. Law §§ 3012 *et seq.* (McKinney 1981). An integral part of the state statutory scheme is Section 3020-a, which provides a vehicle for disciplinary proceedings against tenured teachers upon a finding of probable cause by the Board of Education.[1]

A tenured teacher may be disciplined only after a full due process hearing (if requested) and only on the specific grounds set forth in the Education Law. *Id.* § 3012(2). Proceedings under Section 3020-a are decided by impartial three-member panels. The school district and the teacher each choose one member from a list of panelists established by the Commissioner of Education. Those panelists agree upon a third panel member who is selected from a list supplied by the American Arbitration Association and who serves as chair of the panel. *Id.* § 3020-a(3)(c).

The hearing before the panel must be conducted in accordance with the law and the regulations of the Commissioner. (*See* N.Y. Comp. Codes R. & Regs. tit. 8A, Part 82 (1991).) The teacher has the right to an attorney, to issue subpoenas and to call witnesses N.Y. Educ. Law § 3020-a(3)(c). If the charges are sustained, the panel decides on the appropriate penalty to be imposed—which must be selected from those enumerated in the statute. *Id.* § 3020-a(4). If they are not sustained, the teacher must be restored to his/her position and the charges removed from the teacher's personnel record. The panel's determinations on the charges and the penalty are binding on the school district. *Id.*

---

[1] Section 3020-a has been recognized by the New York Court of Appeals as "a critical part of the system of contemporary protections that safeguard tenured teachers from official or bureaucratic caprice." *Abramovich v. Board of Educ.*, 386 N.E.2d 1077, 1079 (N.Y. 1979); *see also Holt v. Board of Educ.*, 422 N.E.2d 499, 502 (N.Y. 1981).

A teacher (or the school district) may seek review of the panel decision and/or the penalty by appeal to the Commissioner of Education under Section 310 of the Education Law or to the courts under Article 78 of the New York Civil Practice Law and Rules ("CPLR"). *Id.* § 3020-a(5). Under the Education Law, the Commissioner may substitute his judgment for that of the panel.[2] The decision of the Commissioner on appeal is subject to review by the New York State courts. CPLR §§ 7801-7806 (McKinney 1981).[3] A teacher may be suspended by the school district pending resolution of the charges. N.Y. Educ. Law § 3020-a(2) (McKinney 1981). Absent special circumstances, however, the school district must continue to provide full pay and benefits during the suspension.[4]

2. The State Electioneering Statute: As early as 1888, in order to prevent voter intimidation and election fraud, New York law "prohibited any person from 'electioneering on election day within any polling-place, or within one hundred feet of any polling place.'" *Burson v. Freeman*, 112 S. Ct. 1846, 1854 (1992). Essentially the same prohibition remains in place today. N.Y. Elec. Law § 8-104 (McKinney 1978 & Supp. 1994). Section 2031-a of the Education Law specifically addresses school board elections.[5]

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[2] *Shurgin v. Ambach*, 436 N.E.2d 1324 (N.Y. 1982); *Kloepfer v. Commissioner of Educ.*, 82 A.D.2d 974 (3d Dep't 1981), *aff'd without op.*, 436 N.E.2d 1334 (N.Y. 1982).

[3] It is well settled that an Article 78 proceeding provides an adequate avenue for judicial review of constitutional issues raised in or by administrative proceedings. *See, e.g., University Club v. City of New York*, 842 F.2d 37, 40-41 (2d Cir. 1988); *Christ the King Regional High Sch. v. Culvert*, 815 F.2d 219, 224-25 (2d Cir.), *cert. denied*, 484 U.S. 830 (1987); *see also Puentes v. Board of Educ.*, 250 N.E.2d 232, 233 (N.Y. 1969); *Clayton v. Board of Educ.*, 49 A.D.2d 343, 349-50 (3d Dep't 1975).

[4] *Jerry v. Board of Educ.*, 324 N.E.2d 106 (N.Y. 1974).

[5] It reads in pertinent part:

> § 2031-a. Electioneering within one hundred feet of polling place prohibited; distance markers.
>
> 1. At every election held for the office of trustee or member of a board of education . . . there shall be conspicuously placed, by the inspectors of election, distance markers at a distance of one hundred feet

(continued...)

Section 2031-a—the construction of which divided the court below—has not been interpreted by the New York State courts.

The Controlling Facts[6]

The Tuxedo Union Free School District (the "District") is located in the County of Orange, State of New York. Dr. Herbert Fliegner is the Superintendent of the District. Brian Cullen ("Cullen") is a tenured high school teacher of science who has been employed by the District for 18 years.

We turn first to the past "charges and hearings" on which the courts below relied in concluding that the disciplinary proceeding at issue was brought "in bad faith."

1. The Past Disciplinary Proceedings: On February 15, 1990, the District filed charges against Cullen pursuant to Education Law § 3020-a alleging: (i) that during a weekend—in violation of previous directives—Cullen took students on an unauthorized trip in an aircraft; and (ii) that he encouraged students to expose themselves in one of his classes. After a hearing at which Cullen was represented by counsel, the three-member panel found Cullen guilty of the first charge and fined him $1,250.[7] It stated: "This

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[5](...continued)

from the polling place. Such distance markers shall indicate the prohibition contained herein and shall be so placed at least one-half hour before the opening of the polls and shall remain until the polls are closed.

2. At such elections . . . *while the polls are open no person shall do any electioneering within the polling place, or within one hundred feet therefrom in any public street, or within such distance in any place in a public manner and no banner, poster or placard on behalf of or in opposition to any candidate or issue to be voted upon shall be allowed in or upon the polling place or within one hundred feet therefrom during the election.*

N.Y. Educ. Law § 2031-a (McKinney 1988) (emphasis added).

[6] These facts are largely drawn from the Stipulated Statement of Facts by Counsel, which was adopted by the district court and is included in Appendix B hereto. The pages of the Appendices hereto are referred to as "___a."

[7] The second charge was dismissed. The panel emphasized that, although students claimed that Cullen talked about "mooning" in his classroom, he responded appropriately to the "mooning" incident by, *inter alia*, reporting it to the Dean of Students. (93a)

violation of established policy, which [Cullen] well knew . . . is serious. He did put the lives of four students at risk and subjected the District as well as himself . . . to a tremendous liability." (93a) Explaining why they decided not to impose a higher fine, the panel described Cullen as a "very fine teacher" and opined: "we believe that he has learned his lesson from this unfortunate incident." (94a) Cullen did not appeal the decision on the charge or the fine.

On February 13, 1992, the District again filed Section 3020-a charges against Cullen, alleging: (i) that he ignited an aerosol spray in the presence of elementary school students while he was serving as a lunchtime supervisor; and (ii) that such conduct amounted to insubordination in that Cullen had received a prior directive not to engage in such conduct. After a hearing at which Cullen was represented by counsel, the three-member panel found Cullen guilty of both charges and imposed a disciplinary suspension of four months without pay.[8] Explaining the rationale for the penalty it imposed, the panel observed: "Unfortunately, [the prior] fine did not have its desired effect. . . . Aside from exercising poor judgment in performing the experiment in the first instance, [Cullen] reaffirmed the perception that he feels free to disregard certain directives of the District." (111a)

The District appealed to the Commissioner of Education. On May 5, 1994, he ruled that the penalty recommended by the panel was "too lenient" (124a) and instead imposed a one-year suspension without pay (125a). The Commissioner reasoned:

> [Cullen's] conduct . . . , coupled with his prior action of taking students on an unauthorized airplane ride, indicates a pattern of irresponsible conduct with students.
>
> Moreover, . . . both involve actions taken by [Cullen] after he had been specifically directed by district supervisors not to take such actions. The record of this appeal, therefore, also indicates a pattern of insubordination by [Cullen]. (124a)

---

[8] The decision on the charges (98a-109a) was dated July 21, 1992 and announced on or about September 1, 1992 (31a-32a). The penalty determination was made on October 26, 1992. (110a-116a)

2. The Events That Gave Rise to the Disciplinary Proceeding at Issue: On May 6, 1992, an election of candidates for the Board of Education of the District (the "School Board") was held at the District High School.[9] It was governed by Section 2031-a of the Education Law, which prohibits electioneering within 100 feet of the entrance to the polling place. (*See* note 5, *supra*.)

At about 3:30 p.m., after his workday, Cullen went to the front steps of the High School (about 41 feet from the entrance) and began handing out fliers protesting the election.[10] After a member of the District staff advised Superintendent Fliegner that Cullen was distributing fliers on the steps of the High School, the Superintendent approached Cullen. At the time, Cullen was distributing fliers at or about the bottom of the High School steps. Superintendent Fliegner directed him to move from the steps, explaining that, under the election law, he must be at least 100 feet away from the entrance of the High School if he wanted to electioneer. (34a) Cullen responded that the Superintendent could not tell him to do anything after school hours and that he would not move unless instructed by the police to do so. The Superintendent repeated his direction and Cullen again refused. (34a) The Superintendent then called the Tuxedo Police, requesting a unit to instruct Cullen to move to an appropriate distance from the polling place.

During the next hour or so, Cullen was told three times that he could not electioneer on the front steps to the High School, at the foot of the steps or on or next to the concrete apron at the bottom of the steps because those locations were not outside the statutorily prescribed distance from the polling place. (34a-36a)[11] When

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[9] The election took place while the February 13, 1992 charges were pending.

[10] The flier (reprinted at 78a) charged that the election "denie[d] democratic process" because three candidates were running for the same vacancy while two candidates were running unopposed; it also urged a vote against the unopposed candidates. The district court characterized the flier as "rather juvenile" (27a), observing that it "is rather a foolish thing to ask anyone to [vote against unopposed candidates] because it's of no consequence" (25a).

[11] At about 3:40, while Cullen was distributing fliers on the concrete apron at the bottom of the steps to the High School, Joseph Zanetti, Business Administrator for the District, told Cullen that what he was doing was illegal, that he was not

(continued...)

Police Officer John J. Kelly was dispatched to the High School, for example, he found Cullen handing out fliers near the curb leading to the concrete apron in front of the stairs to the High School. Officer Kelly told Cullen that under the election law, he could not pass out the fliers there because he was not 100 feet from the polling place. (36a) Officer Kelly also told Cullen that if he went to the intersection of Tornado Drive and School House Lane, he would be well outside the 100 feet, and escorted Cullen there. (36a)[12]

At about 4:30, District Clerk Nancy Bourke went to the front entrance of the High School and saw Cullen approach an automobile as it was parked immediately to the right of the bottom of the front steps of the school (approximately 70 feet from the entrance to the High School) and hand the driver one of his fliers. (37a) Ms. Bourke then called the Tuxedo Police Department to report that Cullen was again electioneering in front of the High School and was advised that a Police Officer would be sent. When Officer Gannon arrived, he spoke with Cullen inside the High School and told him that the doorways to the High School were the entrance to the polling place. Officer Gannon also gave Cullen a copy of New York State Election Law § 8-104, which prohibits electioneering within a 100-foot radius from the entrances to a polling place.[13]

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[11](...continued)
outside the statutory distance and that he must leave the location. Cullen refused to move. (35a) Soon after that, the Superintendent returned to the front of the High School and, in Mr. Zanetti's presence, directed Cullen to move to 100 feet from the front door of the High School. Cullen repeated that he would move only if so instructed by the police. (35a) Thereafter, Mr. Zanetti telephoned the Commissioner of Elections and confirmed that electioneering was prohibited within 100 feet of the front door of the polling place. The Commissioner also informed Mr. Zanetti of the provision for distance markers. (35a) Superintendent Fliegner then inquired of the School Custodian whether there were any distance markers but was told there were none. (36a)

[12] Soon afterward, Superintendent Fliegner told the District Clerk, Nancy Bourke, that he was leaving; that there had been some electioneering trouble with Cullen; and that if Ms. Bourke had any problem, she was to call the police. Both the Superintendent and the District Clerk were responsible for the conduct of the May 6 election. (38a)

[13] Section 8-104(1) of the Election Law is identical in all material respects to Section 2031-a(2) of the Education Law. (55a, 53a-54a) However, there is no criminal penalty for violation of Section 2031-a(2).

(37a) He then escorted Cullen to the intersection of Hillside Avenue and Tornado Drive, which both agreed was at least 100 feet from the entrances to the High School.

Superintendent Fliegner returned to the High School at about 8:30 p.m. While he and others were in the High School library waiting for the polls to close, one or more voters walked in holding up copies of Cullen's flier and said that a teacher was handing out the fliers in front of the steps of the High School. (37a-38a) Several Board members, the Superintendent and Ms. Bourke then went outside (between 8:40 and 8:45 p.m.) where they again found Cullen on the concrete apron in front of the steps of the High School. (38a) The Superintendent and the then President of the School Board told Cullen that he was violating the election laws and asked him to move from the area. When Cullen did not move, they returned to the High School to summon the police. (38a)

Around 8:50, Mr. Zanetti, returning to the High School, saw Cullen standing on the concrete apron at the foot of the front steps in possession of the fliers that he had been handing out. (38a) He approached Cullen, told him that what he was doing was illegal and directed him to leave. Cullen was then on the same concrete apron where he was standing at about 3:40 when Mr. Zanetti told him he was within the prohibited zone and was even closer to the entrance than he had been when directed by Officer Kelly to move. Nonetheless, Cullen said that he was beyond the 100-foot radius. Mr. Zanetti said that Cullen would "never learn." (38a)

It was stipulated below that, during the May 6 election, no distance markers were placed at a distance of 100 feet from the High School and no written notice of the prohibition on election activity was posted. (38a)[14] It was also stipulated that no one physically measured the distance of 100 feet from the High School entrance on or before May 6 or pointed out to Cullen on May 6

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[14] The District did not have distance markers and had not used them at previous elections. (33a) The Handbook for School Board Members, which Superintendent Fliegner consulted before the election, explains that "'electioneering' is prohibited within 100 feet of the polling place in school district elections." *School Law 1990*, at 65 (New York State School Boards Association 1990). It is silent, however, on the placement of distance markers. (33a)

specifically where 100 feet from the entrance was. (38a) Nor is there any evidence that Cullen asked either of the Police Officers with whom he spoke on May 6 (or anyone else) to tell him precisely where the 100 foot boundary was.

3. The Section 3020-a Proceeding: On September 3, 1992,[15] charges were preferred against Cullen based on the election day events—for "misconduct and/or conduct unbecoming a teacher and/or insubordination" consisting of three instances on May 6 (at approximately 4:30, 8:30 and 8:50 p.m.) when he "engaged in illegal electioneering in violation of Section 2031-a of the Education Law . . . after he knew he could not engage in electioneering within 100 feet of the entrance door to the place of the election." (69a)[16] It was stipulated below that "[d]uring each incident forming the basis of the charges, [Cullen] was situated within 100 feet of the front doors of the High School." (39a)

Cullen requested a hearing and a three-member panel, chaired by James A. Cashen, Esq.,[17] was constituted. The hearing began on February 26, 1993, at which time the District presented its direct case. Cullen's counsel then stated that he had a right to seek a preliminary injunction staying the hearing on the basis that a First

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[15] Section 3020-a(1) permits charges to be filed against a teacher only during the period between the opening and closing of the school year. (38a-39a)

[16] The Teacher Handbook for the District sets forth standards for the conduct of teachers and other staff. Specifically, with respect to "Public Conduct on School Property," it provides in pertinent part:

> The Board of Education prohibits the following conduct or acts on school property by students, teachers, staff members, licensees or invitees * * *
>
> (9) The violation of any federal or state statute, local ordinance, or board policy.
>
> (10) The refusal or failure of any person to comply with a lawful order or direction of an official of the school district in the performance of his duties. (32a)

[17] Mr. Cashen is an attorney, arbitrator and mediator. He is a member of the panels of the American Arbitration Association, the New York State Public Employment Relations Board and the Federal Mediation and Conciliation Service. He is also designated as a panel arbitrator in a number of collective bargaining agreements. Courtney D. Gifford & William P. Hobgood, *Directory of U.S. Labor Arbitrators: A Guide for Finding and Using Arbitrators* 48 (BNA 1985).

Amendment issue was involved but would—"instead"—submit the constitutional claim to the panel. (40a) Accordingly, he requested that the panel decide the constitutional claim on a motion to dismiss before completing the hearing on the merits of the charges. It was stipulated that the entire panel would decide the motion, which would be limited to the First Amendment question. (40a) Both parties briefed the issue.

On April 16, 1993, Cullen's counsel was notified by telephone that his motion to dismiss had been denied, with the Employee Panel Member dissenting. On April 22, 1993, the panel issued its written decision, concluding that "charging Brian Cullen . . . for handing out fliers near the School District polling place, in defiance of directives . . . not to do so, did not restrict Mr. Cullen's right of free speech under the First Amendment." (47a-48a)[18]

The Commencement of This Action and the District Court Decision

Dissatisfied with the ruling on his motion to dismiss, Cullen commenced this action in the U.S. District Court for the Southern District of New York on April 20, 1993.[19] Cullen contended, as he had before the panel, that the charges against him were brought in bad faith and violated his right to freedom of speech under the First Amendment. He sought an order enjoining the Section 3020-a proceeding, as well as attorneys' fees. The District denied any violation of Cullen's First Amendment rights—relying on *Burson v. Freeman,* 112 S. Ct. 1846 (1992). It also urged dismissal of the

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[18] The panel (i) relied on this Court's decision in *Burson v. Freeman,* 112 S. Ct. 1846 (1992); (ii) specifically found that the placement of distance markers is "not a condition precedent to application of the electioneering prohibition under Section 2031-a(2) of the Education Law"; and (iii) found that "the directives of the District and Board officials were not intended to, and did not in fact, prevent [Cullen] from expressing his opinion." (48a)

[19] The jurisdiction of the district court was invoked pursuant to 42 U.S.C. §§ 1983 and 1985 and 28 U.S.C. §§ 1331 and 1343.

By order to show cause, the district court stayed all proceedings of the Section 3020-a panel pending further order of the court. The stay was later extended on consent as a temporary restraining order by order of the court, which also consolidated the hearing on the request for preliminary injunctive relief with trial on a permanent injunction.

action under the Abstention Doctrine enunciated in *Younger v. Harris,* 401 U.S. 37 (1971).

On May 28, 1993, the district court rendered its decision from the bench, permanently enjoining the Section 3020-a proceeding. (21a-29a) The court stated that the District could enforce the no electioneering prohibition in Section 2031-a "if [it] had posted the content neutral regulation as required by the statute *and* made it applicable to everybody *and* had someone there all day to enforce it as to everybody." (27a; emphasis added) In contrast, the court found the District's method of enforcement constitutionally deficient, characterizing it as "not narrowly tailored or content neutral" and "strictly ad homin[e]m." (27a) In that regard, the district court did not rely on evidence of selective enforcement, for there was none. Instead, it speculated that "there *may* have been other people standing within the 100 feet distance" as to whom the statute was not enforced. (26a; emphasis added)

As is evident from the Court of Appeals treatment of the abstention issue, it is not clear that the district court considered and decided that issue. It did, however, refer to "a past history of personal conflict with [Cullen] resulting in the making of charges and hearings and imposition of fines" as evidence of "animus." (24a) The court also concluded that the pending charges were brought "in bad faith," relying on its view that they "clear[ly]" could not be upheld given the absence of distance markers. (26a)

The Court of Appeals Decision

Over a cogent and pointed dissent by Judge Amalya L. Kearse, and citing no authority other than *Burson v. Freeman,* 112 S. Ct. 1846 (1992), a panel majority of the U.S. Court of Appeals for the Second Circuit held that finding Cullen in violation of Section 2031-a(2), absent the posting of distance markers or the functional equivalent thereof, would infringe upon his free speech rights under the First Amendment. The majority so held despite its acknowledgment that "irrespective of where the 100 foot boundary was located, [Cullen] was well aware that he was inside it when he continued electioneering on the High School steps after speaking with the Superintendent and the police." (9a)

The majority's holding was premised on an assumption that there is a First Amendment right to electioneer at precisely 100 feet from a polling place. It also apparently presumed that the mere susceptibility of a statute to selective enforcement renders it constitutionally defective regardless whether it was in fact selectively enforced.[20] In essence, the panel majority concluded that, because the School District failed to post distance markers at 100 feet from the polling place, Cullen was privileged—even after he received actual notice of the electioneering prohibition—to continue to electioneer at locations he knew were inside the 100-foot zone.

Judge Kearse dissented, disagreeing with the view that there was no violation of Section § 2031-a because the District did not provide the notice required by the statute. "Though § 2031-a(1) requires the posting of notices," she said, "the prohibition in § 2031-a(2) is not conditioned on the posting of notices." (17a) On the First Amendment issue, Judge Kearse stated:

> I think the majority is far wide of the mark in holding that the defendants violated the plaintiff's constitutional rights by seeking to hold him responsible for violating N.Y. Education Law § 2031-a (McKinney 1988). . . .
>
> . . . I do not agree . . . that the failure of the school board to post markers showing the plaintiff where to stand in order to be *"just"* 100 feet away . . . gave him license to stand 0 feet away in the guise of lack of notice and to hold defendants liable for allegedly violating his right to campaign exactly 100 feet away. (17a-18a; citations omitted)

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[20] The panel majority stated: "Allowing notice [of the electioneering prohibition] to be conveyed in the manner employed by the School District would *facilitate* (i) the curtailment of Appellee's First Amendment right to express his views to the voters as near to the polling place as the statute permits; and (ii) the selective enforcement of the prohibition on electioneering." (9a; emphasis added) With respect to selective enforcement, the majority acknowledged: "It may be argued that [Cullen] himself was in a position to know if such selective enforcement actually occurred, and would have offered evidence to that effect." (10a n.2) The majority went on, however, to quote with apparent approval the district court's speculation that "'there *may* have been other people standing within the 100 foot distance and speaking with each other.'" (10a n.2; emphasis added) Section 2031-a, however, prohibits only electioneering "in a public manner." (54a)

With respect to abstention, the panel majority "assume[d] that the district court concluded that the bad faith exception to the Younger doctrine was applicable." (13a)[21] Although acknowledging that the exception is "'narrow'" (13a), and expressing uncertainty as to the findings on which the district court justified its failure to abstain, the majority disposed of the abstention issue in three cursory paragraphs and with no evident consideration as to whether there was record support for the "findings" of the court below. "Presumably," the majority said, the findings on which the district court based its decision were: (i) its "apparent conclusion" that the charges were "in retaliation for the exercise of Cullen's right to protest the school board elections"; (ii) a "'past history of personal conflict' with Cullen"; (iii) the District's "'strictly *ad hominem*' manner" of enforcing Section 2031-a; and (iv) the "chilling effect" imposed by the charges and disciplinary proceeding. (13a) Describing the determination supported by these "findings" as not "clearly erroneous," the majority affirmed the district court's decision not to abstain. (13a)

No mention was made of Judge Kearse's agreement with the District's interpretation of Section 2031-a as evidencing that the charges were brought with a good faith belief that the statute had been violated; nor did the majority acknowledge that the previous disciplinary proceedings had resulted in findings of guilt. The authority cited by the majority on the abstention issue, moreover, was in stark contrast to the record here.[22]

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[21] Cullen submitted *sub judice* that all three *Younger* abstention factors were present. Accordingly, the panel majority assumed that the factors were present and confined its affirmance to the district court's (presumed) decision as to the applicability of the "bad faith" exception. (11a-12a n.4)

[22] *E.g., Rowe v. Griffin*, 676 F.2d 524 (11th Cir. 1982) (*per se* bad faith based on prosecution, in violation of immunity agreement, brought 13 years after plaintiff testified in exchange for immunity); *Shaw v. Garrison*, 467 F.2d 113, 117-19 (5th Cir.) (enjoining perjury prosecution because, *inter alia*, prosecutor's pre-trial conduct showed a "total disregard of" the plaintiff's rights, state witnesses had clearly committed perjury but were not prosecuted and prosecutor had a financial interest in prosecution), *cert. denied*, 409 U.S. 1024 (1972); *Lewellen v. Raff*, 843 F.2d 1103 (8th Cir. 1988) (approving a temporary injunction based *inter alia* on allegations of "pervasive racism and

(continued...)

REASONS FOR GRANTING THE WRIT

During the more than two decades since *Younger v. Harris,* 401 U.S. 37 (1971), was decided, this Court has not approved a single intervention by the federal courts in a pending state proceeding on the basis of the "bad faith" exception so casually applied by the court below. Nonetheless, apparently failing to appreciate the significance of the principles that animate the Abstention Doctrine, the panel majority chose to decide a question of first impression under a New York State election law—without benefit of any New York State court interpretation of the law—and in effect declared that law (as well as the election laws of dozens of other states) unconstitutional as written. On that basis, the majority approved the enjoining of a disciplinary proceeding pursuant to the New York State Education Law involving charges against a teacher who admittedly defied repeated directives from school officials with respect to his conduct on school property. The majority justified that injunction by reference to a finding of "animus" based solely on prior disciplinary charges against the teacher—charges that the Commissioner of Education has found were warranted by the teacher's "pattern of irresponsible conduct with students" and "his pattern of insubordination." (124a)

Thus, this case is paradigmatic of the compelling considerations that underlie the federal restraint dictated by *Younger* and its progeny. The disregard by the panel majority below of important

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[22](...continued)
discriminatory treatment of blacks" in court system and direct evidence that prosecution was in retaliation for plaintiff's defense of a black minister in a state trial), *reh'g denied,* 851 F.2d 1108, *cert. denied,* 489 U.S. 1033 (1989). The majority also cited *Lewellen v. Raff* for the proposition that "the expectations for success of the party bringing the action need not be relevant." (14a) It apparently overlooked a later decision in that case in which the Eighth Circuit pointed out that the district court had found a substantial likelihood that the plaintiff "would establish that the prosecutor 'had no reasonable expectation of getting a conviction.'" 851 F.2d at 1110. In that later decision, the Eighth Circuit cited with approval *Smith v. Hightower,* 693 F.2d 359, 369 (5th Cir. 1982), which specifically held "that it is erroneous for a district court to refuse to consider evidence as to whether the prosecutors entertained a reasonable expectation of obtaining a conviction." 851 F.2d at 1109.

state interests, the legitimate authority of the state courts with respect to questions of state law and established principles of comity and federalism demonstrates a compelling need for guidance from this Court.

On the First Amendment question, which should not even have been reached by the courts below, the panel majority's decision rests on three fundamentally erroneous premises:

- That there is a First Amendment right to electioneer at precisely 100 feet from a polling place—a contention implicitly rejected by this Court in *Burson v. Freeman*, 112 S. Ct. 1846 (1992) and expressly rejected by the Fifth Circuit in *Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1396 (1994);
- That the School District's failure to delineate the precise boundaries of the no electioneering zone constitutionally insulated Cullen from a hearing on his refusal to cease electioneering at locations known by him to be within the proscribed zone—a conclusion properly rejected by the dissent below and in conflict with the applicable decisions of this Court; and
- That an enforcement method is constitutionally deficient simply because it "make[s] possible" selective enforcement (11a) even if there is no evidence of selective enforcement—a notion at odds with this Court's holding in *Wayte v. United States*, 470 U.S. 598, 609 (1985), and decisions of virtually all the Circuit Courts of Appeal.

I. THE DECISION BELOW IS IN CONFLICT WITH *BURSON V. FREEMAN* AND OTHER DECISIONS OF THIS COURT, AS WELL AS THE FIFTH CIRCUIT'S DECISION IN *SCHIRMER V. EDWARDS*; IT ALSO CALLS INTO QUESTION THE CONSTITUTIONALITY OF ELECTION LAWS IN HALF THE STATES.

A. In *Burson v. Freeman*, 112 S. Ct. 1846 (1992) ("*Burson*"), this Court upheld Tennessee's election-day prohibition on political speech within 100 feet of polling places. Based on the history of election law regulation in this country, the plurality concluded that

a "wide-spread and time-tested consensus demonstrates that some restricted zone is necessary in order to serve the States' compelling interest in preventing voter intimidation and election fraud." 112 S. Ct. at 1855. It then proceeded to the question of "*how large* a restricted zone is permissible or sufficiently tailored." *Id.* at 1856.

On that question, given the compelling state interest at stake, a majority of the Court rejected the contention that the 100-foot boundary must be shown to be empirically necessary or "perfectly tailored" to achieve the state's purpose. *Id.* at 1857.[23] Rather, the test applied was whether the boundary is "'reasonable and does not *significantly impinge* on constitutionally protected rights.'" *Id.* (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986)). The plurality continued:

> We do not think that the minor geographic limitation prescribed by § 2-7-11(b) constitutes such a significant impingement. Thus, we simply do not view the question whether the 100-foot boundary line could be somewhat tighter as a question of "constitutional dimension." Reducing the boundary to 25 feet, as suggested by the Tennessee Supreme Court is a difference only in degree, not a less restrictive alternative in kind.

Id. (citations omitted). The plurality acknowledged that "[a]t some measurable distance from the polls . . . government regulation of vote solicitation could effectively become an impermissible burden." *Id.* Declining to apply any "'litmus-paper test,'" however, the plurality found it "sufficient to say" that a 100-foot boundary is "on the constitutional side of the line." *Id.*

Thus, *Burson* established that there is no constitutionally protected right to political speech within a statutory 100-foot campaign-free zone while the polling place is open. Equally important, *Burson* did *not* establish that there is a constitutionally protected right to electioneer at precisely 100 feet—or at 110 feet—from the polling place. To the contrary, issues such as the outer

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[23] Justice Scalia, concurring in the judgment, found the statute constitutional as a "reasonable, viewpoint-neutral regulation of a nonpublic forum." *Id.* at 1859.

limit of the campaign-free zone and how the distance limitations are enforced are simply not questions of "constitutional dimension" (*id.*), provided that they are reasonable and do not significantly impinge on constitutionally protected rights (*id.*). Plainly, given the reasoning in *Burson*, it cannot be inferred that a statutory campaign-free zone suddenly poses an issue of constitutional dimension, or suddenly becomes a significant impingement on First Amendment rights, at 105 feet or even at 125 feet, from the polling place. Indeed, the U.S. Court of Appeals for the Fifth Circuit recently upheld the constitutionality of a Louisiana statute that proscribes campaign activity within a 600-foot radius of polling places. *Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1396 (1994).[24]

Thus, even assuming *arguendo* that the absence of distance markers "effectively prevented" Cullen from standing "*just* 100 feet from the polling place" (9a), that is not a matter of constitutional dimension. It may have been error for the District not to place the distance markers required by Section 2031-a(1) of the Education Law. Such an error, however, no more gives rise to a constitutional issue than would the mistaken placement of distance markers at a point 105 feet rather than 100 feet from the polling place. To paraphrase the Court in *Poulos v. New Hampshire*, 345 U.S. 395, 409 (1953), "[i]t would be unreal to say that such [a failure by the District] to act in accordance with state law, redressable by state judicial procedures, are state acts violative of the Federal Constitution."

B. The panel majority concluded that the School District's method of enforcing Section 2031-a did not provide "adequate notice" of "the parameters of the campaign free zone." (9a, 8a) Whatever the merit of that conclusion in the abstract, it is irrelevant here given the unanimous finding of the court below that Cullen

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[24] The Fifth Circuit emphasized the reasoning of the *Burson* plurality that the precise size of the campaign free zone is not a matter of "constitutional dimension" and that "'[r]educing the boundary . . . is a difference only in degree, not a less restrictive alternative in kind.'" 2 F.3d at 122 (quoting *Burson*, 112 S. Ct. at 1857). On that basis, it concluded that the 600-foot limitation was permitted by *Burson*.

was "well aware" that he was inside the proscribed zone when he continued to electioneer after being directed by the Superintendent and the police to cease doing so. (9a, 18a) Thus, the adequacy of the notice that Cullen received must be assessed in light of the conduct with which he was charged. As Judge Kearse stated in dissent, "the failure of the school board to post markers showing [Cullen] where to stand in order to be *'just'* 100 feet away . . . [did not give] him license to stand 0 feet away in the guise of lack of notice and to hold defendants liable for allegedly violating his right to campaign exactly 100 feet away." (18a)

Judge Kearse's dissent is supported by this Court's decision in *Bethel Sch. Dist. No. 403 v. Fraser,* 478 U.S. 675 (1986), where a student was suspended based on the content of a speech he delivered to a school assembly. The School Handbook contained a disciplinary rule forbidding "the use of obscene, profane language or gestures." *Id.* at 678. In addition, before he delivered the speech, two teachers advised the student that the speech was "inappropriate" and that delivering it might have "severe consequences." *Id.* The student challenged his suspension on due process grounds, arguing that he did not receive adequate notice that the speech would subject him to discipline. Rejecting that argument, this Court stated: "The school disciplinary rule proscribing 'obscene' language *and the prespeech admonitions of teachers* gave adequate warning to Fraser that his lewd speech could subject him to sanctions." *Id.* at 686 (emphasis added).

In other circumstances as well, where a statute is challenged as void for vagueness, this Court has refused to accept hypothetical lack of notice arguments urged by persons whose conduct was squarely within the proscribed zone. As stated in *Parker v. Levy,* 417 U.S. 733, 756 (1974):

> None of [the distinctions we have drawn with respect to the required degree of precision in drafting] suggests that one who has received fair warning of the criminality of his own conduct from the statute in question is nonetheless entitled to attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit. One to whose conduct a statute

> clearly applies may not successfully challenge it for vagueness.

See also Broadrick v. Oklahoma, 413 U.S. 601, 608 (1973) ("even if the outermost boundaries of [the statute] may be imprecise, any such uncertainty has little relevance here, where appellants' conduct falls squarely within the 'hard core' of the statute's proscriptions"); *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 59 (1976) (rejecting vagueness challenge because "any element of vagueness in [the] ordinances has not affected these respondents").

C. A passive enforcement policy is not unconstitutional merely because it "make[s] possible" (11a) selective enforcement.[25] In *Wayte v. United States,* 470 U.S. 598 (1985), for example, this Court rejected a constitutional challenge to a policy of passive enforcement under which the Selective Service System investigated and prosecuted only persons who reported themselves, or were reported by others, as having violated the law requiring registration with the Selective Service. It was contended that this policy discriminated against "vocal" opponents of the registration program. Applying equal protection standards, the Court held that the party alleging selective enforcement was required "to show both that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose." *Id.* at 608.

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[25] The panel majority seems to have treated this case as if it involved a facial challenge to a statute under the void-for-vagueness doctrine. Thus, rather than finding selective enforcement (of which there was no evidence), the panel majority spoke of the enforcement method used by the District as "facilitat[ing]" and "mak[ing] possible . . . selective enforcement." (9a, 11a) Whatever the scope and complexity of the doctrine that governs facial challenges to state laws (*e.g., Lakewood v. Plain Dealer Publishing Co.,* 486 U.S. 750 (1988)), it is clear that this case does not involve a facial challenge to Section 2031-a of the Education Law. Beyond question, the gravamen of the Complaint is a challenge to the District's *application* of the no electioneering law to Cullen. (57a-68a) Moreover, this case does not—and could not—involve any contention that, in Section 2031-a(2) of the Education Law, the New York legislature failed to provide adequate standards for those who apply it or vested unfettered discretion in election officials to determine whether the no electioneering law has been violated. By its terms, Section 2031-a(2) establishes clear guidelines as to the parameters of the no electioneering zone as well as the public conduct that is not permitted within that zone.

Equally significant, under the enforcement policy at issue in *Wayte*, nonregistrants were told of their obligations under the law, given a grace period to comply and told that, if they refused, they would face possible prosecution. In concluding that vocal nonregistrants were not subjected to any special burden, the Court stated in words particularly apt here: "Indeed, those prosecuted in effect selected themselves for prosecution by refusing to register after being reported and warned by the Government." *Id.* at 610. Here too, Cullen in effect selected himself for discipline when he deliberately refused—after warnings—to cease electioneering at locations he knew to be within the statutorily proscribed zone.

In any event, in order to make a *prima facie* showing of selective enforcement, the plaintiff is required to demonstrate (i) that others similarly situated have generally not been prosecuted because of conduct that forms the basis for the charges against him, and (ii) that the government's discriminatory selection of him for prosecution was based upon an impermissible ground.[26] Here, there was no showing whatsoever of other "similarly situated" persons (*i.e.*, others electioneering within the 100-foot zone), let alone of similarly situated persons against whom the electioneering law was not enforced.

D. The implications of this case go far beyond the New York electioneering law and the Section 3020-a proceeding enjoined below. Election laws in as many as 26 states—like Section 2031-a(2) of the Education Law—establish a geographic zone around polling places in which campaigning is not permitted on election day, but do not require that the boundaries of the zone be defined

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[26] *See Rybachek v. United States*, No. 91-33160, 1993 U.S. App. LEXIS 26404, at *12 n.5 (9th Cir. Sept. 29, 1993) ("Unless similarly-situated nonvocal violators were not prosecuted, there has not been selective prosecution."); *see also United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974); *United States v. Schoolcraft*, 879 F.2d 64, 68 (3d Cir.), *cert. denied*, 493 U.S. 995 (1989); *United States v. Johnson*, 577 F.2d 1304, 1308 (5th Cir. 1978); *United States v. Hazel*, 696 F.2d 473, 474-75 (6th Cir. 1983); *United States v. Catlett*, 584 F.2d 864, 866 (8th Cir. 1978); *United States v. Scott*, 521 F.2d 1188, 1195 (9th Cir. 1975), *cert. denied*, 424 U.S. 955 (1976); *C.E. Carlson, Inc. v. Securities Exch. Comm'n*, 859 F.2d 1429, 1437 (10th Cir. 1988); *United States v. Mangieri*, 694 F.2d 1270, 1273 (D.C. Cir. 1982).

by distance markers or signs.[27] All these states appear to contemplate enforcement of their campaign-free zones by (i) actual notice to the person engaged in electioneering within the zone and (ii) enforcement by the police of a request to leave the zone in the face of a refusal to do so. The panel majority nonetheless concluded that enforcing a no electioneering statute in this manner, "[a]bsent the posting of distance markers, or the functional equivalent thereof" (8a), would infringe upon the First Amendment right to electioneer at the statutorily permitted distance from the polling place (11a).

Thus, the decision below calls into question the constitutionality of election laws in fully half the states. If allowed to stand without review by this Court, it will at the very least engender widespread uncertainty regarding the enforceability of those laws—and perhaps encourage disruption at polling places throughout those states, thereby jeopardizing the very integrity and reliability of elections that the laws are intended to protect.

II. THE DECISION BELOW IS SO FUNDAMENTALLY AT ODDS WITH THE TEACHINGS OF THIS COURT IN *YOUNGER V. HARRIS* AND ITS PROGENY THAT SUMMARY REVERSAL IS WARRANTED.

A. In *Younger,* this Court held, based on long-standing principles of comity and federalism, that federal courts should

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[27] Ark. Code Ann. § 7-1-103 (Michie 1993); Cal. Elec. Code § 29470 (West 1989); Del. Code Ann. tit. 15, § 4942 (1993); Ill. Comp. Stat. ch. 10, para. 5/4-7 (Smith-Hurd 1993); Ind. Code Ann. § 3-14-3-16 (Burns 1993); Iowa Code Ann. § 49.107 (West 1991 & Supp. 1994); Kansas Stat. Ann. § 25-2430 (1993); Ky. Rev. Stat. Ann. § 117.235 (Baldwin 1982); La. Rev. Stat. Ann. § 18:1462 (West 1979 & Supp. 1994); Mich. Comp. Laws Ann. §§ 168.744, 168.931 (West 1989); Minn. Stat. Ann. § 211B.11 (West 1992 & Supp. 1994); Miss. Code Ann. § 23-15-895 (1993); Mo. Ann. Stat. 8-A §§ 115.635, 115.637 (Vernon 1980 & Supp. 1994); Neb. Rev. Stat. § 32-1221 (1988); N.J. Stat. Ann. §§ 18A:14-46, 18A:14-72, 18A:14-73, 18A:14-81, 19:34-6, 19:34-7, 19:34-15 (West 1989); N.M. Stat. Ann. §§ 20-1-20-16, 3-8-77 (Michie 1991); N.C. Gen. Stat. § 163-147 (1993); Okla. Stat. Ann. tit. 26, §§ 7-108, 16-111 (West 1991); Or. Rev. Stat. § 260.695 (1993); S.C. Code Ann. § 7-25-180 (Law. Co-op. 1991); S.D. Codified Laws § 12-18-3 (1982); Utah Code Ann. § 20A-3-501 (Supp. 1993); Wash. Rev. Code Ann. § 29.51.020 (West 1993); W. Va. Code Ann. § 3-3-2a (1994); Wisc. Stat. Ann. §§ 12.03, 7.37 (West 1986 & Supp. 1993); and Wyo. Stat. § 22-26-113 (1992).

refrain from enjoining state criminal proceedings. This Abstention Doctrine has been extended to quasi-criminal proceedings and to civil proceedings of the type involved here that implicate important state interests.[28] One source of the Abstention Doctrine

> is the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. . . . *[A]n even more vital consideration [is] the notion of "comity," that is, a proper respect for state functions*, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

401 U.S. at 43-44 (emphasis added). A third important reason for *Younger* abstention is to avoid unwarranted determination of federal constitutional questions. *Moore v. Sims*, 442 U.S. 415, 429-30 (1979); *Trainor v. Hernandez*, 431 U.S. 434, 445 (1977).

Younger itself recognized that there are exceptions to the Abstention Doctrine, but emphasized that they are "extremely limited." 401 U.S. at 56 (Stewart, J. concurring) "[E]ven irreparable injury," the Court said, "is insufficient unless it is 'both great and immediate.'" *Id.* at 46. Among the circumstances that this Court has identified as *not* sufficient, in and of themselves, to warrant the enjoining of a state proceeding are: (i) "the cost, anxiety, and inconvenience of having to defend against a single criminal

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[28] *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619 (1986); *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982). The proceeding at issue here was unquestionably an ongoing state proceeding, judicial in nature (*see, e.g., Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619); it implicates educational interests that are "precisely the sort of [state] interest which notions of comity and federalism . . . command the federal courts to respect" (*Williams v. Red Bank Bd. of Educ.*, 662 F.2d 1008, 1017 (3d Cir. 1981)); and if dissatisfied with the ultimate decision of the panel, Cullen had an adequate opportunity for judicial review of his constitutional claim (N.Y. Educ. Law § 3020-a(5) (McKinney 1981)).

prosecution" (*Younger*, 401 U.S. at 46); (ii) "the existence of a 'chilling effect,' even in the area of First Amendment rights" (*id.* at 51); and (iii) the "facial invalidity of a statute" (*Huffman v. Pursue, Ltd.*, 420 U.S. 593, 602 (1975)).

The Abstention Doctrine permits intervention in ongoing state proceedings only in exceptional situations "where the District Court properly finds that the state proceeding is motivated by a desire to harass or is conducted in bad faith, or where the challenged statute is '"flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it."'" *Huffman*, 420 U.S. at 611 (citations omitted). "[P]rosecutorial bad faith . . . in this context generally means that a prosecution has been brought without a reasonable expectation of obtaining a valid conviction." *Kugler v. Helfant*, 421 U.S. 117, 126 n.6 (1975); *see also Perez v. Ledesma*, 401 U.S. 82, 85 (1971).[29] Similarly, multiple prosecutions, brought without regard to their outcome, may constitute irreparable harm within the meaning of the *Younger* doctrine because, in such circumstances, "the threat to the plaintiff's federally protected rights . . . cannot be eliminated by his defense against a single criminal prosecution." *Younger*, 401 U.S. at 46.[30]

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[29] *E.g.*, *Nobby Lobby, Inc. v. City of Dallas*, 970 F.2d 82, 88 (5th Cir. 1992) (approving refusal to abstain where multiple seizures of equipment were made after appellate court had held such seizures invalid); *Westin v. McDaniel*, 760 F. Supp. 1563, 1573-74 (M.D. Ga. 1991) (enjoining indictment where state had "no hope" of proving charges), *aff'd without op.*, 949 F.2d 1163 (11th Cir. 1991); *McGuire v. Roebuck*, 347 F. Supp. 1111 (E.D. Tex. 1972) (accord).

[30] *E.g.*, *Literature, Inc. v. Quinn*, 482 F.2d 372 (1st Cir. 1973) (seven arrests in eighteen months and a series of warrantless seizures); *Krahm v. Graham*, 461 F.2d 703 (9th Cir. 1972) (over 100 charges of violation of anti-obscenity law in two years and none of eleven cases that had gone to trial resulted in convictions); *Video Store, Inc. v. Holcomb*, 729 F. Supp. 579 (S.D. Ohio 1990) (plaintiffs had successfully defended five criminal prosecutions and twelve more were pending). In determining whether a state proceeding was brought in bad faith, some lower courts have considered, *inter alia*, evidence of selective prosecution. *See, e.g.*, *Show-World Ctr., Inc. v. Walsh*, 438 F. Supp. 642 (S.D.N.Y. 1977) (granting a motion to preliminarily enjoin a vacate order allegedly issued on health and safety grounds where none of the other tenants.

(continued...)

A plaintiff asserting bad faith prosecution as an exception to the *Younger* doctrine must allege specific facts to support an inference of bad faith. "The Younger rule, as applied in *Hicks* [*v. Miranda,* 422 U.S. 332 (1975)], requires more than a mere allegation and more than a 'conclusory' finding to bring a case within the harassment exception." *Grandco Corp. v. Rochford,* 536 F.2d 197, 203 (7th Cir. 1976).

B. The "findings" on which the district court based its conclusion that the disciplinary charges against Cullen were brought "in bad faith" were few, vague and conclusory. Indeed, the panel majority found it necessary to engage in surmise as to the basis for the district court's determination. "Presumably" (13a), the majority said, it was based on:

- The district court's "*apparent* conclusion that . . . the charges . . . were brought in retaliation for the exercise of [Cullen's] right to protest the school board elections";
- A "'past history of personal conflict' with Cullen" and a "desire 'to do something about' him [that] rose to the 'level of animus'"—particularly the "'charges and hearings and impositions of fines' that preceded the School District's attempt to enforce § 2031-a against Cullen";
- The "'strictly *ad hominem*' manner" of enforcing Section 2031-a of the Education Law; and
- The "chilling effect" imposed on Cullen's First Amendment rights by the charges and the disciplinary proceeding. (13a; emphasis added)

The first three of these "findings," which superficially track circumstances recognized by some lower courts as constituting bad faith, do not withstand even minimal scrutiny. The fourth was expressly rejected by *Younger* as legally insufficient to warrant a refusal by the federal courts to abstain.

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[30](...continued)
who were not engaged in sexually oriented businesses, were forced to vacate); *but see Palmarozza v. Platt,* No. 86-0127, 1986 WL 2438 (E.D. Pa. Feb. 19, 1986) (selective prosecution is not an adequate reason to invoke exception to *Younger* doctrine).

The district court's finding that the charges were retaliatory was predicated solely on its view that there could be no violation of Section 2031-a in the absence of distance markers.[31] In other words, the district court concluded that the charges could not be sustained and, on that basis alone, inferred retaliatory motive. The question for the district court, however, "was not the guilt or innocence of the person charged; the question was whether the statute was enforced against [him] with no expectation of convictions but only to discourage exercise of protected rights." *Cameron v. Johnson,* 390 U.S. 611, 621 (1968).

Here, there is no basis from which it can properly be inferred that the District had no expectation that the charges would be sustained. There was (and is) no New York State court decision holding that the distance markers are a condition precedent to enforcement of Section 2031-a(2).[32] A majority of the Section 3020-a panel concluded that the placement of distance markers "was not a condition precedent to application of the electioneering prohibition." (48a) And, if there were any doubt as to the reasonableness of that view, it should have been eliminated when Judge Kearse reached the same conclusion. (17a) Thus, to the extent that the courts below based their determination of bad faith on a conclusion that the electioneering law had not been violated, they committed plain error.

The second "finding" relied on by the courts below—"animus" evidenced by the prior "charges and hearings and imposition of fines"—is a virtual parody of settled law. Multiple prosecutions,

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[31] The district court explicitly so stated: "the Court is convinced that no disciplinary charges would have been brought except for the content of the pamphlet, *since it's clear without a posting there was no violation.*" (26a; emphasis added) *See also* 26a ("the Court finds the disciplinary charges were brought in bad faith . . . *since [Cullen] could not be found to have violated the law because there were no markers there*") (emphasis added).

[32] As Judge Kearse pointed out, when the New York State Legislature intended to establish the posting of markers as a condition of enforcing a no electioneering prohibition, it knew how to do so. (17a) *See* N.Y. Educ. Law § 2609(4-a)(b) (McKinney 1981) ("*Where such markers are so placed* and the polls are open, no person shall do any electioneering within the polling place, or within one hundred feet therefrom . . . .") (emphasis added).

brought without hope of success, may justify a federal court's intervention in state proceedings. *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *see also* note 30, *supra*. In such circumstances, "the threat to the plaintiff's federally protected rights [is] one that cannot be eliminated by his defense against a single criminal prosecution." *Younger*, 401 U.S. at 46. This concern, however, assumes that the multiple prosecutions are brought without reasonable possibility of success. Here, in contrast, three of the four previous "charges" referred to by the district court were unanimously upheld by three-member panels constituted pursuant to the Education Law and were not even appealed by Cullen. (*See* pp. 4-5, *supra*.) The penalties previously imposed on Cullen, moreover, were imposed by three-member panels and by the New York State Commissioner of Education (not by the District). Absent impeachment of those impartial decision-makers (and there was none), there is no basis for any inference that the charges they sustained were brought for other than entirely legitimate reasons.[33]

Indeed, a bad faith claim was rejected by this Court in *Hicks v. Miranda*, based on a similar rationale. There, a three-judge court had allowed film distributors to bring a federal action challenging California's obscenity statute while criminal proceedings were pending against them, based on evidence of multiple seizures of copies of the film at issue as well as cash receipts from its showing. Characterizing the findings of bad faith and harassment as "vague" and "conclusory," the Court emphasized that each of the seizures had been pursuant to a valid warrant. Accordingly, the Court concluded, "[a]bsent at least some effort by the District Court to impeach the entitlement of the prosecuting officials to rely on repeated judicial authorization for their conduct, we cannot agree that bad faith and harassment were made out." 422 U.S. at 351.[34]

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[33] It also bears emphasis that Section 3020-a panels do not have access to a teacher's prior disciplinary record unless and until there has been a finding of guilt on the current charges. (*See* 70a, 99a.)

[34] *See also Collins v. County of Kendall*, 807 F.2d 95, 99 (7th Cir. 1986) ("[i]nstituting approximately thirty criminal prosecutions over a two-year period does not constitute bad faith or harassment in or of itself"), *cert. denied*, 483 U.S. 1005 (1987); *United Books, Inc. v. Conte*, 739 F.2d 30 (1st Cir. 1984)

(continued...)

The "finding" of selective (or "*ad hominem*") enforcement is equally flawed. The burden of showing selective enforcement rests on the party alleging that a statute has been selectively enforced. (*See* pp. 19-20, *supra.*) The courts below, however, improperly attempted to shift that burden by in effect requiring the School District to prove the *absence* of selective enforcement. A similar attempt was rejected by this Court in *Cameron v. Johnson*, 390 U.S. 611 (1968), where the federal plaintiffs had been arrested for picketing that obstructed ingress and egress from the courthouse in violation of an anti-picketing statute. Rejecting an argument that selective enforcement was shown by evidence of parades in the vicinity of the courthouse, the Court emphasized that "[t]here was no evidence of conduct . . . which would have brought the statute into play, let alone evidence that the authorities allowed such conduct without enforcing the statute." *Id.* at 622. Here, too, there is no evidence that anyone other than Cullen was electioneering within 100 feet of the High School, let alone that the School District permitted such conduct without enforcing Section 2031-a of the Education Law. As Judge Kearse stated in dissent, "the majority's hypothesis of possible selective enforcement of the prohibition against electioneering within 100 feet of the High School [is] a matter that is purely speculative." (17a)[35]

In the final analysis then, the determination that this case falls within the bad faith exception to the *Younger* doctrine rests exclusively on the "finding" that the disciplinary charges and the Section 3020-a proceeding "'imposed a chilling effect' on [Cullen's] First Amendment rights." (13a) Such a finding, however, cannot support a determination of bad faith, for "the existence of a 'chilling effect,'

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[34](...continued)
(multiple prosecutions do not support an inference of harassment where they generally result in convictions); *Grandco*, 536 F.2d at 204 ("Continued prosecutions under the ordinance for repeated violations indicates only good faith enforcement of a judicially approved provision against judicially disapproved conduct.").

[35] *See also Pincham v. Illinois Judicial Inquiry Bd.*, 872 F.2d 1341, 1350 (7th Cir. 1989) (refusing to find "bad faith" absent allegations that state agencies were aware of the activities of others similarly situated and treated them more favorably than the plaintiff as part of a campaign that used prosecutions, regardless of outcome, to suppress speech).

even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action." *Younger*, 401 U.S. at 51. As the Seventh Circuit stated in *Pincham*, 872 F.2d at 1350, "[b]ecause [appellant] alleges nothing more than that a single state judicial disciplinary proceeding has had a 'chilling effect' on his free speech rights, he has failed to establish that 'extraordinarily pressing need for immediate equitable relief' required before coming within the purview of this exception to the *Younger* doctrine."[36]

In a sense, every enforcement proceeding seeks to deter or "chill" the conduct that is the basis of the charge. If bad faith could be found every time a statute under which an enforcement proceeding was brought is found unconstitutional, as the Court stated in *Hicks*, 422 U.S. at 352, "the rule of *Younger v. Harris* would be swallowed up by its exception." Under the *Younger* Abstention Doctrine, there is no access to the federal courts to enjoin a state enforcement action that is believed in good faith to be valid simply because the action may be (or is) ultimately found unconstitutional.

Finally, the courts below ignored that the Abstention Doctrine acknowledges that "federal courts should avoid the unnecessary resolution of federal constitutional issues and that state courts provide the authoritative adjudication of questions of state law." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 508 (1985) (O'Connor, J. concurring). Here, federal adjudication of Cullen's claim entailed "unwarranted determination of federal constitutional questions" (*Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 (1987)) because the Section 3020-a panel, the New York State Commissioner of Education, or the New York State Courts may have resolved this case (and still may) on state statutory or constitutional grounds. Thus, the New York State courts were denied the opportunity to

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[36] *See also, e.g., United Books*, 739 F.2d at 33 (assertion that state prosecution has had a "chilling effect" on First Amendment rights is insufficient to bring case within bad faith exception to *Younger* doctrine); *Williams*, 662 F.2d at 1022 n.14 (claim that state proceeding was brought "in retaliation for exercise of First Amendment rights" is insufficient to satisfy standards for exception to the *Younger* doctrine); *Suggs v. Brannon*, 804 F.2d 274, 278 (4th Cir. 1986) (complaint that bad faith enforcement of obscenity laws had a "chilling effect" on first amendment rights was insufficient to invoke exception to *Younger*).

address their own state law in an area of great interest to the state—state election practices and tenure disputes—and in a way that might have obviated the need for further consideration of Cullen's constitutional claim.

C. If the decision below is allowed to stand without review by this Court, it will have serious consequences for school districts throughout the states encompassed by the Second Circuit, and perhaps beyond, in an area of profound significance to the states—namely, the ability to maintain a qualified body of teachers willing and able to meet acceptable standards of conduct.[37] As this Court has stated, "education is perhaps the most important function of state and local governments." *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). It is equally clear that "a professional and competent body of teachers capable of meeting high standards of conduct" is "[e]ssential to the performance of this critically important function." *Williams*, 662 F.2d at 1017.[38] A federal court injunction ordering school district officials to cease action on disciplinary charges against a tenured teacher "cannot have other than a disruptive impact on the state's ability to ensure a competent and qualified body of teachers." *Id.* at 1018 n.10.

If review is not granted, the decision below will stand as an invitation to teachers faced with disciplinary charges to seek the intervention of the federal courts whenever the conduct that is the subject of the charges is even arguably protected by the First Amendment under some constitutional theory, no matter how novel or unfounded. Under the decision below, the federal court would be justified in deciding the alleged constitutional question based on nothing more than the so-called "chilling effect" imposed by the

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[37] Indeed, the potential disruptive impact of the decision below is not limited to school districts but extends as well to all public employers that provide for their employees pre-discipline due process proceedings similar to those afforded by Section 3020-a of the New York State Education Law.

[38] "Consciously or otherwise, teachers . . . demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986); *Ambach v. Norwick*, 441 U.S. 68, 78-79 (1979).

charges and the disciplinary proceedings themselves—an effect that will inevitably be present because the very purpose of disciplinary charges is of course to deter or "chill" the conduct on which it is based.

Ironically, moreover, given the reasoning of the panel majority, intervention by the federal courts would more readily be available to teachers against whom previous disciplinary charges had been brought—even if the charges had been sustained by impartial decision-makers such as a Section 3020-a panel or the Commissioner of Education. In the parlance of the district court, approved by the panel majority, such charges—no matter how meritorious—could provide the basis for an inference of "animus." (24a, 13a) Thus, as was the case here, teachers who have engaged in "a pattern of irresponsible conduct with students" or "a pattern of insubordination" (124a) could rely on their own past misconduct to justify an exception to the Abstention Doctrine.

CONCLUSION

Whatever the precise contours of the "bad faith" exception to the Abstention Doctrine, this case clearly does not fall within them. We therefore urge that the decision below be summarily reversed in light of *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny. In the alternative, because the questions presented are important, substantial and likely recurring, we urge that this petition for a writ of certiorari be granted and that the case be set for plenary review.

Respectfully submitted,

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